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No. 664

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

CHARLES SHORTER AND MAXINE SHORTER, et al.,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

---

BRIEF OF RESPONDENT, SECURITY INSURANCE COMPANY, IN OPPOSITION

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED

1. Has a District Court ruled upon a party's claim to subrogation where the said party under Rule 52 (b), specifically moves the Court to so find and the District Court denies the entire motion without opinion?

2. Has a Court of Appeals, having before it the record containing the motion of a party moving the District Court

to find, as a matter of law, said party entitled to subrogation and the order of the District Court denying said motion, sufficiently reviewed and ruled upon said claim by affirming the judgment of the District Court without opinion?

3. Has a Court of Appeals erred in affirming a District Court's refusal to contravene the provisions of Rule 55 (a), (b) and (d) by entering a judgment in favor of a cross-complainant where a co-defendant against whom the relief is sought, fails or neglects to file an Answer and the cross-complainant neglects or refuses to follow the provisions of said Rule?

CONSTITUTIONAL AND STATUTORY PROVISIONS

FEDERAL RULES OF CIVIL PROCEDURE

RULE 52

FINDINGS BY THE COURT

"(a) Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 *or any other motion* (emphasis ours) except as provided in Rule 41 (b)."

RULE 55

DEFAULT

"(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

"(b) Judgment. Judgment by default may be entered as follows:

"(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk

upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

"(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

"(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c)."

ARGUMENT

This court must first decide whether or not there is any merit to petitioner's claim of being deprived of property without due process of law, the gravamen of the claim being the alleged failure of the District Court to rule on petitioner's claim to subrogation and the failure to enter judgment

on petitioner's cross-claim against the mortgagors (co-defendants).

If the District Court effectively disposed of the subrogation claim and correctly refused to enter judgment for the petitioner on its cross-claim then the Court of Appeals was obviously not in error in affirming the District Court; there was no denial of due process, and this Court must refuse the writ.

1. Examining petitioner's motion filed pursuant to Rule 52 (b). (Record p. 41), we find in paragraphs six and seven, at the top of page three, clear, concise and specific demands by motion upon the District Court to find, as a matter of law, petitioner's right to subrogation and, in paragraph seven, to find it entitled to judgment on its cross-claim against the mortgagors.

The District Court, in unequivocal language, denied the said claims, (Record p. 46, Petitioner's Appendix, p. 29).

It is difficult for this respondent to conceive, under the foregoing procedure, how or in what manner the District Court "failed," "refused," or "neglected" to rule upon the said claims of petition. It is clear under Rule 52 (a), Federal Rules of Civil Procedure, that the District Court need not make findings of fact or conclusions of law in deciding such a motion, nor, must it do so in deciding petitioner's motion under Rule 59, also denied (Record p. 46, Petitioner's Appendix C, p. 29).

Further, we think it worthy to note and respectfully direct this court's attention to the fact that the motion filed by the petitioner under Rule 52 (b) (Record p. 41), contained seventeen requests by the petitioner for amendments and amplifications of the District Court's previous findings of fact (Record p. 38 et seq., Petitioner's Appendix, A,

pages 24 and 25), and contained ten requests for amendments and amplifications of the District Court's conclusions of Law (Record p. 38 et seq., Petitioner's Appendix A, p. 26), all twenty-seven points ruled upon in exactly the same manner, yet petitioner complains of but two.

Thus, a clear decision was made by the District Court to petitioner's claim to a right of subrogation and its claim for a judgment on its cross-claim. Certainly, the merits of this decision are not before this court. The fact is that a ruling was made.

2. The Court of Appeals, in affirming the judgment of the District Court had before it the same motion containing the same demands and the same order of the District Court denying those demands. It is implicit that the District Court's judgment and the basis therefor was in fact reviewed and ruled upon by the Court of Appeals. (Record p. 50, Petitioner's Appendix D, p. 31).

The Court of Appeals committed no error in this or any other respect.

3. With reference to petitioner's claim as to its right for a judgment on its cross-claim, the District Court correctly and perceptively refused such judgment for to have done otherwise would have clearly contravened the provisions of Rule 55 (a), (b) and (d), Federal Rules of Civil Procedure.

The petitioner cannot now complain of its own failure to exert affirmative action in following the Federal Rule specifically provided in such situations.

The Court of Appeals, in refusing to reverse the District Court in the latter's correct interpretation as to the petitioner's course in obtaining its judgment, was not in error.

CONCLUSION

The facts in this case were complicated; the pleadings voluminous and the proceedings lengthy. The patience of the District Court with the petitioner as well as all of the parties was manifestly generous. It is regrettable that the petitioner, through its counsel, sees fit to characterize conduct of a United States District Court and a United States Court of Appeals in a manner hardly becoming one seeking redress before this tribunal.

This respondent genuinely believes that all of the proceedings in the District Court were proper under the Rules of Court and that the Court of Appeals was not in error in its affirmation thereof.

Respectfully submitted,

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